Supreme Court, U.S.
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In The

Supreme Court of the United States

STEVEN T. PINKSTON,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

PETITION FOR WRIT OF CERTIORARI

BENEDON & SERLIN
GERALD M. SERLIN [SBN 123421]
Counsel of Record
DOUGLAS G. BENEDON [SBN 110197]
21700 Oxnard Street, Suite 1290
Woodland Hills, California 91367
(818) 340-1950

Attorneys for Petitioner
Steven T. Pinkston

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a criminal defendant is denied due process of law by a jury instruction, given pursuant to California Vehicle Code section 2800.2, which specifies that the mental state of "willful or wanton disregard for the safety of persons or property" – the element necessary to establish felony evading of a pursuing peace officer – is established simply from proof of the predicate facts of three Vehicle Code violations or property damage, thus relieving the prosecution of its burden of proof on this issue.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Steven T. Pinkston, respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of California affirming his judgment of conviction.

OPINION BELOW

The Court of Appeal's opinion is published at 112 Cal.App.4th 387 (2003), and is reproduced in the Appendix to this Petition at pages 1-28. The unreported order denying petitioner's petition for review to the California Supreme Court is reprinted in the Appendix at page 29.

The judgment of the California Court of Appeal was rendered on September 30, 2003, affirming petitioner's conviction and sentence. A petition for review to the California Supreme Court was timely filed and denied on December 17, 2003.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment XIV of the United States Constitution provides:

> Sect. 1: All persons born or naturalized in the United States, and subject to the jurisdiction

> thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Vehicle Code section 2800.2 provides, in pertinent part:

> (a) If a person flees or attempts to elude a pursuing peace officer in violation of Section 2800.1 and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment in the state prison, or by confinement in the county jail for not less than six months nor more than one year. . . .
>
> (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs.

STATEMENT OF THE CASE

Petitioner Steven T. Pinkston was charged with two felony counts of evading an officer with willful disregard, in

violation of California Vehicle Code section 2800.2, subdivision (a).[1] Clerk's Transcript ["C.T."] at 58. Petitioner pled not guilty to the charges. C.T. at 24, 61, 67, 77; Reporter's Transcript ["R.T."] at A2-A3, 1.

Petitioner was tried by a jury. On Count 1, petitioner was found guilty of the lesser included offense of evading an officer with willful disregard, in violation of Section 2800.1, subdivision (a), a misdemeanor. C.T. at 129; R.T. at 220. On Count 2, petitioner was found guilty of evading an officer with willful disregard, in violation of Section 2800.2, subdivision (a), a felony. C.T. at 130; R.T. at 220-21.

On Count 2, the court imposed a 25 years to life sentence, as enhanced by the three strikes allegation pursuant to California Penal Code section 667, subdivisions (b)-(i) and California Penal Code section 1170.12, subdivisions (a)-(d). C.T. at 209-12; R.T. at 251. Petitioner's sentence on Count 1 was run concurrently with Count 2. C.T. at 209-11; R.T. at 252.

On appeal, petitioner challenged the constitutionality of Section 2800.2, which provides in relevant part:

> (a) If a person flees or attempts to elude a pursuing peace officer . . . and the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property, the person driving the vehicle, upon conviction, shall be punished by imprisonment.. . . . [¶] (b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to,

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[1] Unless otherwise indicated, all statutory references are to the California Vehicle Code.

> driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under Section 12810 occur, or damage to property occurs.

Specifically, citing *County Court of Ulster County v. Allen*, 442 U.S. 140 [60 L.Ed.2d 777, 99 S.Ct. 2213] (1979), and *Sandstrom v. Montana*, 442 U.S. 510 [61 L.Ed.2d 39, 99 S.Ct. 2450] (1979), petitioner urged that Section 2800.2 creates a constitutionally prohibited mandatory presumption which violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The error stems from the language of the section, which establishes that the element of "willful or wanton disregard for the safety of persons or property" exists if the basic fact of three Vehicle Code violations or property damage is present.[2] In short, petitioner argued that

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[2] Consistent with Section 2800.2, the jury was instructed with modified California Jury Instructions – Criminal (CALJIC) No. 12.85 (7th ed. 2003), which included the following explanation:

> A willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time the person driving commits three or more Vehicle Code violations, such as running a red light, a violation of VC 21453, failing to stop at a posted stop sign, a violation of VC 22450, passing a vehicle on the right by driving off the main traveled portion of the roadway, a violation of VC 21750, driving with a suspended license, a violation of VC 13601.1, or damage to property. [¶] 'Willful or wanton' means an act or acts intentionally performed with a conscious disregard for the safety of persons or property. It does not necessarily include an intent to injure. C.T. at 114-15; R.T. at 170.

(Continued on following page)

Section 2800.2 reduced the prosecution's burden of proof with respect to the element of willful or wanton disregard for the safety of persons or property.

A divided court, in a published opinion, rejected petitioner's constitutional challenge, finding instead that Section 2800.2 sets out the California Legislature's definition of what qualifies as "willful or wanton" conduct. As the majority explained, "[a]lthough Vehicle Code section 2800.2 uses the phrase 'willful or wanton disregard for the safety of persons or property' to describe an element of reckless evading, the statute defines this element so that it may be satisfied by proof of property damage or by proof [] that the defendant committed three Vehicle Code violations. Thus, section 2800.2, subdivision (b) establishes a rule of substantive law rather than a presumption apportioning the burden of persuasion concerning certain propositions or varying the duty of coming forward with evidence." Petitioner's Appendix at 7-8.

As articulated by the dissent, the majority's analysis falters because Section 2800.2, subdivision (b), permits the Prosecution to prove conscious disregard for the safety of persons or property based on the commission of three or more Vehicle Code violations or the occurrence of property damage. "This goes beyond mere definition and constitutes a classic example of a 'mandatory presumption' because it 'tells the trier [of fact] that [it] must find the elemental fact upon proof of the basic fact. . . . ' (*County Court of*

Notably, the jury was *not* instructed that the enumerated California Vehicle Code sections must, themselves, be done with willful and wanton disregard for the safety of persons or property.

Ulster County v. Allen (1979) 442 U.S. 140, 157 [].)" Petitioner's Appendix at 25. According to the dissent, the instant case is closely analogous to *Carella v. California*, 491 U.S. 263 [105 L.Ed.2d 218; 109 S.Ct. 2419] (1989), in which this Court found an unconstitutional mandatory presumption, i.e., that if a rental car were not returned within five days following expiration of the rental agreement, the defendant embezzled the car. Petitioner's Appendix at 24.

The California Supreme Court denied a petition for review based on the same claim of error. Petitioner's Appendix at 29.

REASONS FOR GRANTING THE WRIT

As discussed below, certiorari should be granted because this case presents an issue to which Supreme Court Rule 10(c) applies, i.e., the California Court of Appeal has decided an important question of federal constitutional law in a way that conflicts with relevant decisions of this Court.[3]

[3] The arguments in this brief were successfully set forth in the appellant's brief on the merits in *Carella v. California, supra,* 491 U.S. 263.

I. BECAUSE THE TRIAL COURT'S INSTRUCTION PURSUANT TO SECTION 2800.2 COULD HAVE BEEN REASONABLY INTERPRETED AS DIRECTING A CONCLUSIVE PRESUMPTION, PETITIONER WAS DENIED DUE PROCESS OF LAW.

A. Mandatory Presumptions Relieve The Prosecution Of Its Constitutional Duty To Prove Its Case Beyond A Reasonable Doubt.

A presumption is an evidentiary device pursuant to which a jury is instructed that it may or must infer proof of one or more elements of an offense from proof of certain predicate facts. See generally *County Court of Ulster County v. Allen, supra,* 442 U.S. at 156-60. Before a presumption is used, it must be tested against the "bedrock, axiomatic and elementary" Fourteenth Amendment principle that the State must prove "beyond a reasonable doubt [] every fact necessary to constitute the crime." *In re Winship,* 397 U.S. 358, 363-64 [25 L.Ed.2d 368; 90 S.Ct. 1068] (1970) (internal quotations omitted); see also, e.g., *Carella v. California, supra,* 491 U.S. at 265. To the extent a "reasonable juror" could have interpreted the instruction as relieving the prosecution of its constitutional duty to prove its case beyond a reasonable doubt, a conviction cannot stand. *Carella v. California, supra,* 491 U.S. at 265; *Francis v. Franklin,* 471 U.S. 307, 315 [85 L.Ed.2d 344; 105 S.Ct. 1965] (1985); *Sandstrom v. Montana, supra,* 442 U.S. at 514.

Application of these principles requires a "straightforward" two-part inquiry. *Francis v. Franklin, supra,* 471 U.S. at 313. Because the term "presumption" subsumes a variety of evidentiary devices, the analysis begins with a careful determination of the kind of presumption at issue

in the case. See *County Court of Ulster County v. Allen, supra,* 442 U.S. at 157-63. Once that determination is made, the reviewing court must then assess the precise presumption involved against the fundamental requirement that the prosecution "prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged." *Patterson v. New York*, 432 U.S. 197, 210 [53 L.Ed.2d 281; 97 S.Ct. 2319] (1977). Under this analysis, the statutory presumption presented to petitioner's jury was plainly unconstitutional.

B. A Reasonable Juror Could Have Interpreted The Trial Court's Instruction As An Impermissible Conclusive Presumption.

Determining the type of presumption at issue in a given case "requires careful attention to the words actually spoken to the jury." *Sandstrom v. Montana, supra,* 442 U.S. at 514. Because it is the jury, and not the court, that actually applies the charge, the inquiry focuses on the manner in which the jurors themselves might have understood their directions. *Francis v. Franklin, supra,* 471 U.S. at 313-14; *California v. Brown*, 479 U.S. 538, 541 [93 L.Ed.2d 934; 107 S.Ct. 837] (1987). For that reason, the private understanding of the trial judge or, in the case of a statutory presumption, the actual intent of the legislature that enacted it, are irrelevant. See *Sandstrom v. Montana, supra,* 442 U.S. at 515-17. Regardless of any such intent, "whether a defendant has been accorded his constitutional rights depends on the way in which a reasonable juror could have interpreted the instruction" as a whole. *Id.* at 514.

Here, the jury could have reasonably construed CALJIC 12.85 as requiring a conclusive presumption of "willful or wanton disregard for the safety of persons or property" from proof of the predicate facts of three Vehicle Code violations or property damage. See Section 2800.2. Indeed, the instruction is not merely susceptible of that interpretation, it compels it. The jury's charge was "cast in the language of command." *Francis v. Franklin, supra,* 471 U.S. at 316. Because a reasonable juror could have interpreted the instruction as conclusively directing him or her to find petitioner guilty of felony evading, the constitutionality of the instruction must be evaluated accordingly.

C. Because The Instruction Could Have Been Reasonably Interpreted As A Conclusive Presumption, It Deprived Petitioner Of Due Process Of Law.

A presumption's validity turns in large part on the degree to which "the device curtails the factfinder's freedom to assess the evidence independently." *County Court of Ulster County v. Allen, supra,* 442 U.S. at 156. Thus, a purely permissive inference – i.e., where a jury is told that it may, but is not required to, assume a relationship between proof of certain predicate facts and an element of the substantive offense – does not run afoul of *Winship's* command since the prosecution must still prove the relationship between the predicate fact and the suggested conclusion beyond a reasonable doubt. In contrast, a charge which directs jurors to conclusively presume proof of an element solely on the basis of proof of a predicate necessarily relieves the prosecution of its constitutional obligation to prove "beyond a reasonable doubt . . . every fact necessary to constitute the crime." *In re Winship,*

supra, 397 U.S. at 364. For that reason, as the Court has repeatedly held, such instructions are categorically prohibited by the Fourteenth Amendment. See, e.g., *Francis v. Franklin, supra,* 471 U.S. at 317; *Sandstrom v. Montana, supra,* 442 U.S. at 521-23.

Here, the jury could have interpreted the trial court's instruction as directing a mandatory conclusive presumption of "willful or wanton disregard for the safety of persons or property" from proof of the predicate facts of three Vehicle Code violations or property damage. No instruction suggested, for example, that the enumerated Vehicle Code violations themselves had to be done with willful or wanton disregard for the safety of persons or property. Rather, the mandatory direction from the trial court directly foreclosed the jury's independent consideration of whether the facts proved established the element of willful and wanton conduct with which petitioner was charged. As such, the instruction relieved the State of its burden of proof articulated in *In re Winship,* i.e., of proving by evidence every essential element of petitioner's crime beyond a reasonable doubt. *Carella v. California, supra,* 491 U.S. at 266.

On this basis, CALJIC 12.85's mandatory presumption violated the Fourteenth Amendment because it not only "conflict[s] with the overriding presumption of innocence with which the law endows the accused, but also because it invade[s] [the] factfinding function which in a criminal case the law assigns solely to the jury." *Carella v. California, supra,* 491 U.S. at 268 (Citations and internal quotations omitted) (Scalia, J., concurring).

II. THE ABSENCE OF A SUFFICIENT CONNECTION BETWEEN THE PREDICATE AND PRESUMED FACTS RENDERS SECTION 2800.2 INDEPENDENTLY UNCONSTITUTIONAL.

In addition to complying with the specific mandate of *In re Winship,* criminal presumptions must satisfy a second requirement to comport with due process. Even if the presumption serves only to shift the burden of production, the logical connection between the predicate and the presumed facts must, at minimum, be sufficiently tight to guard against an irrational jury verdict. See *Tot v. United States,* 319 U.S. 463, 467-69 [87 L.Ed. 1519; 63 S.Ct. 1241] (1943); see generally *County Court of Ulster County v. Allen, supra,* 442 U.S. at 163-67. While existing case law leaves some doubt as to the precise standard to be applied in this context, Section 2800.2 fails under even the most forgiving formulation of the test.

Even when a presumption merely authorizes a permissive inference – that is where the jury is told it may, but need not, infer an elemental fact from proof of a predicate – due process requires a "rational connection" between the proven and the inferred facts. See *United States v. Gainey,* 380 U.S. 63, 66 [13 L.Ed.2d 658; 85 S.Ct. 754] (1965). Under the controlling test, presumptions of this nature are invalid "unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend." *Leary v. United States,* 395 U.S. 6, 36 [23 L.Ed.2d 57; 89 S.Ct. 1532] (1969); see also, e.g., *Barnes v. United States,* 412 U.S. 837, 842 [37 L.Ed.2d 380; 93 S.Ct. 2357] (1973); *Turner v. United States,* 396 U.S. 398, 404-05 [24 L.Ed.2d 610; 90 S.Ct. 642] (1970).

Mandatory presumptions, in contrast, must satisfy a significantly more stringent standard. In such cases, the jury is directed to rely on the presumption – i.e., to find an element of the offense from proof of a non-elemental fact. Because such presumptions necessarily implicate the *In re Winship* right, due process requires a far tighter connection between the predicate and presumed facts. As the Court has suggested on a number of occasions, presumptions of that nature are invalid unless "the fact proved is sufficient to support the inference of guilt beyond a reasonable doubt." *County Court of Ulster County v. Allen, supra,* 442 U.S. at 167; see also, e.g., *Barnes v. United States, supra,* 412 U.S. at 845-46 (finding presumption permissible under "reasonable doubt standard"); *Leary v. United States, supra,* 395 U.S. at 36 n.64 (declining to decide whether presumption must satisfy reasonable-doubt standard since it failed even the "more-likely-than-not" test); *Turner v. United States, supra,* 396 U.S. at 416 (holding that presumption failed under either standard). Any lesser showing would permit the prosecution to obtain a conviction even though it had not proved its case to the requisite level of certainty.

While the statutory presumption at issue here – like any other form of mandatory presumption – warrants analysis under the more demanding of the two tests, there is no reason to decide that issue here. Even if the appropriate measure were the test articulated in *Leary v. United States, supra,* it cannot be "said with substantial assurance that the presumed fact" – willful or wanton disregard for the safety of persons or property – "is more likely than not to flow from the proved fact" – three or more Vehicle Code violations or the presence of property damage. 395 U.S. at 36.

There are obviously a host of circumstances – well short of willful or wanton misconduct – which could exist even where a person commits three or more Vehicle Code violations or causes property damage. Undoubtedly the most common circumstance is where a person drives at a rate which is slightly in excess of the speed limit. Similarly, a person might not fully pause at a stop sign, or may slowly "roll" through it. Likewise, a person might enter a controlled intersection just as the light is turning red. Even though such conduct might amount to an infraction, it is sufficiently commonplace to undermine the rationality of a scheme that categorically presumes willful or wanton misconduct solely from three Vehicle Code violations or the presence of property damage.

Notably, the particular circumstances of this case – specifically, the fact that petitioner was involved in a high-speed pursuit – are irrelevant to the constitutional inquiry. As the Court made clear in *County Court of Ulster County, supra,* 442 U.S. at 157-59, challenges to the rationality of mandatory presumptions are necessarily facial. Because "the trier of fact is forced to abide by the presumption, and may not reject it based on an independent evaluation of the particular facts presented by the State, the analysis of the presumption's constitutional validity is logically divorced from those facts and [is] based on the presumption's accuracy in the run of cases." *Id.* at 159. Given this generic focus, the only pertinent question is whether engaging in three or more Vehicle Code violations or sustaining property damage "is more likely than not" to suggest willful or wanton misconduct. Because that question can only be answered in the negative, the logical connection between the predicate and presumed facts set

out in Section 2800.2 is far too tenuous to survive scrutiny under the Due Process Clause.

In sum, as in both *Sandstrom* and *Franklin*, the dispositive question in this matter is whether the jury would have reasonably interpreted the trial court's charge as directing an impermissible conclusive presumption. As set forth above, that question must be answered in the affirmative. But even if the appropriate analytic focus were the facial validity of Section 2800.2, it would not survive scrutiny under the Due Process Clause. The inference Section 2800.2 directs is insufficiently rational to satisfy the demands of due process.

III. THE CONSTITUTIONAL ERROR WAS PREJUDICIAL AND REQUIRES REVERSAL.

In *Yates v. Evatt*, 500 U.S. 391 [114 L.Ed.2d 432, 111 S.Ct. 1184] (1991), the Court explained when the use of an unconstitutional presumption requires reversal. The test is whether it appears beyond a reasonable doubt the error complained of did not contribute to the verdict. *Id.*, at 403. To say an error did not contribute to the verdict, is to find the error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record. *Ibid.* The focus is on the significance of the presumption to reasonable jurors, when measured against other evidence considered by those jurors independently of the presumption. *Id.*, at 403-04.

The Court explained that before determining whether an error is harmless, two distinct steps must be taken. In the first, the court asks what evidence the jury actually considered in reaching its verdict, i.e., whether the jury looked only at the predicate facts or considered other

evidence bearing on the fact subject to the presumption. *Yates v. Evatt, supra,* 500 U.S. at 404.

In the second step, the court weighs the probative force of the evidence considered by the jury against the probative force of the presumption standing alone. *Yates v. Evatt, supra,* 500 U.S. at 404. An error is not harmless simply because the jury considered evidence from which it could have come to the verdict without reliance on the presumption. *Ibid.* Instead, the issue is whether the jury actually rested its verdict on evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. *Ibid.* In resolving this issue, the court asks whether the force of the evidence presumably considered by the jury in accordance with its instructions is so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the presumption. *Id.,* at 405. It is only when the effect of the presumption is comparatively minimal to this degree that it can be said that the presumption did not contribute to the verdict. *Ibid.*

Here, it cannot be said beyond a reasonable doubt that the erroneous mandatory presumption did not contribute to petitioner's verdict, i.e., that the presumption was unimportant in relation to everything else the jury considered. *Yates v. Evatt, supra,* 500 U.S. at 403. Here, the trial court's instruction mandated the presumption that "willful or wanton disregard for the safety of persons or property" was established if the driver commits three Vehicle Code violations or causes property damage. The jurors were told through the presumption that they needed to consider only the predicate facts of traffic violations or property damage to determine whether the willful or wanton disregard element was present. The presumption permitted the jury

to disregard other evidence which otherwise served to rebut the willful or wanton disregard element. Additionally, the presumption excused the jurors from finding whether the Vehicle Code violations themselves were committed in a "wanton disregard for the safety of persons or property" allowing petitioner to be convicted on technical violations of the Vehicle Code.[4]

Notably, the jury here expressly acknowledged difficulty with the presumption created by CALJIC No. 12.85. Shortly after beginning deliberations, the jury prepared a note asking: "Does the violation of 3 or more Vehicle Codes constitute willful or wanton disregard for safety of other? (In & of itself)" C.T. at 90. The trial court instructed the jury that the answer to its question was "yes." C.T. at 90. Thereafter, the jury sent a second note regarding the presumption. C.T. at 93.

Additionally, the evidence related to petitioner's felony evading offense suggests the chances of an accident were small. Among the relevant factors were that the pursuit began on a Sunday and proceeded through residential areas where the traffic was light. Petitioner never came close to striking any other vehicle, either police or civilian. He never caused any other driver to stop, brake hard, or avoid a collision. Additionally, in view of the fact that petitioner preceded a marked Sheriff's squad car, with lights and sirens activated, it would be difficult to imagine

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[4] Indeed, there is a difference between going slowly through a stop sign with no traffic present, and going through at high speed, in heavy traffic, with no regard for that traffic. Though, while technically a violation, the former may not amount to "wanton disregard."

that any other vehicles would not see this procession coming. Finally, the chase lasted two minutes.

Thus, the probative force of the presumption outweighed the probative force of the evidence. That is, it does not appear the jury rested its verdict on the evidence establishing the presumed fact beyond a reasonable doubt, independently of the presumption. Nor was the effect of the presumption comparatively minimal to the degree it can be said the presumption did not contribute to the verdict. The presumption allowed the jury to find the willful and wanton disregard element solely from the Vehicle Code violations or property damage. The evidence of the traffic violations was straightforward and undisputed. The presumption allowed the jury to find the willful and wanton disregard element to be present from these facts without any need to conduct an independent evaluation of that element from any other evidence.

Because this mandatory presumption undoubtedly eased the jury's task, there is no reason to believe the jury would have deliberately undertaken the more difficult task of evaluating the evidence related to the element. See, e.g., *Hernandez v. Rayl,* 944 F.2d 794, 797 (10th Cir. 1991) (finding that the presumption instruction was not harmless error.) This is true here.

The jury was told it could base the willful and wanton disregard element entirely on the presence of the Vehicle Code violations or property damage. There is no reason to believe the jury would have undertaken the unnecessary and more difficult task of evaluating the evidence related to this element rather than simply using the presumption. This is especially true when the prosecution in closing argument told the jury that they could find the "wanton

and willful" element through the evidence of Vehicle Code violations alone:

> The Court has instructed you there is a definition for what constitutes . . . willful or wanton disregard for the safety of people or property. . . . [A]nd finally, if there were three or more traffic violations [] while the defendant is being pursued and evading the police with the red lights on and the sirens going, being chased in a marked patrol car, with the police officer in uniform, if he commits three or more traffic violations, that constitutes a felony. R.T. at 184.

Thus, absent the presumption, the evidence of the issue of "willful or wanton disregard for the safety of persons or property" is not overwhelming. It cannot be said, beyond a reasonable doubt, that the jury rejected the simple and undisputed presumption-based path to a finding of guilt. Nor can it be determined from the record that the conviction was not based on this presumption-tainted theory.

CONCLUSION

For the foregoing reasons, petitioner prays for a writ of certiorari, to issue to the Court of Appeal of California.

Dated: March 12, 2004

Respectfully submitted,

BENEDON & SERLIN
GERALD M. SERLIN
DOUGLAS G. BENEDON

Attorneys for Petitioner
Steven T. Pinkston

Filed 9/30/03

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. STEVEN TERROSE PINKSTON, Defendant and Appellant. B159294 (Los Angeles County Super. Ct. No. TA062346)

APPEAL from a judgment of the Superior Court of Los Angeles County, Steven C. Suzukawa, Judge. Affirmed.

Benedon & Serlin and Gerald M. Serlin, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Michael C. Keller and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

Steven Terrose Pinkston appeals the judgment entered after conviction by jury of evading an officer with willful disregard for the safety of persons and property, a felony, and evading arrest, a misdemeanor. (Veh. Code, §§ 2800.2, subd. (a), 2800.1, subd. (a).) The trial court

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* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of sections 2, 3, 4, and 5 of the Discussion.

sentenced Pinkston to a term of 25 years to life in state prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Prosecution's evidence.*

The evidence introduced at trial established Pinkston's involvement in two separate instances of evading a peace officer.

a. *The September 14th incident.*

On September 14, 2001, at approximately 8:45 p.m., Culver City Police Officer Michael Poulin stopped a Camaro driven by Pinkston. Poulin approached the Camaro and requested Pinkston's driver's license and registration. Pinkston repeatedly asked why Poulin had stopped him. When Poulin asked Pinkston to step from the vehicle, Pinkston sped from the scene. Poulin chased Pinkston with overhead lights and siren at speeds up to 100 miles per hour but was unable to apprehend Pinkston.

Culver City Police Officer Jason Davis assisted Poulin in the pursuit of Pinkston. When Davis attempted to turn north on La Brea Avenue from Slauson Avenue, a vehicle failed to yield to Davis's red lights and siren and a traffic accident ensued in which both cars were "totaled" and the driver of the civilian vehicle was taken from the scene in an ambulance.

b. *The incident of October 21.*

On Sunday, October 21, 2001, at approximately 10:00 a.m., Sheriff's Deputies Pablo Partida and Dennis Parker attempted to stop Pinkston's Camaro. As Partida and Parker approached the Camaro on foot, it sped away.

Partida chased Pinkston with overhead lights and siren. Pinkston went through a posted stop sign at 124th Street and Slater Avenue, continued north on Slater Avenue and then east on 123rd Street at 50 to 60 miles per hour in a residential area. Pinkston ran a posted stop sign at 123rd Street and Compton Avenue, continued south on Compton Avenue and increased the distance between himself and the deputies. Pinkston went through a red light at Compton Avenue and El Segundo Boulevard, ran a stop sign at 132nd Street and Compton Avenue and continued at 60 miles per hour east on Stockwell Avenue from Slater Avenue. Pinkston slowed on Stockwell Avenue because of speed bumps on the street. The convertible top of the Camaro flew open as it went over the speed bumps. Pinkston proceeded north on Grandee Avenue, failed to stop at a posted stop sign at 132nd Street and Grandee Avenue and increased his speed to 60 miles per hour in a residential zone. Pinkston went through a red light at Grandee Avenue and El Segundo Boulevard and proceeded west on 127th Street to a dead end. Pinkston slowed to approximately five miles per hour and jumped from the moving Camaro a few feet before it struck a retaining wall. Pinkston was detained at gunpoint.

2. *Defense evidence.*

Pinkston presented no affirmative defense.

3. *Sentencing considerations.*

The jury convicted Pinkston of evading arrest, a misdemeanor, with respect to the September 14 incident, and convicted him of felony evading with respect to the October 21 incident. The trial court found Pinkston had a prior conviction of voluntary manslaughter in 1992 and a prior conviction of making a terrorist threat in 1998. The

trial court declined to strike either prior conviction in the interests of justice and sentenced Pinkston to a term of 25 years to life in state prison.

CONTENTIONS

Pinkston contends Vehicle Code section 2800.2 creates an unconstitutional mandatory presumption, the trial court erroneously failed to instruct the jury on unanimity, the prior conviction of making a criminal threat does not qualify as a strike, the trial court abused its discretion in denying Pinkston's motion to strike the prior convictions in the interests of justice and the term imposed constitutes cruel and unusual punishment.

DISCUSSION

1. *Vehicle Code section 2800.2 does not create an unconstitutional mandatory presumption.*

a. *Background.*

Vehicle Code section 2800.1, set out in full in the margin, makes it a misdemeanor to attempt to evade a peace officer wearing a distinctive uniform and driving a distinctively marked patrol vehicle with red light and siren activated.[1] The offense is elevated to an alternate

[1] Vehicle Code section 2800.1 provides: "Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist: [¶] 1. The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] 2. The peace officer's motor vehicle is

(Continued on following page)

misdemeanor felony by Vehicle Code section 2800.2, subdivision (a), if "the pursued vehicle is driven in a willful or wanton disregard for the safety of persons or property. . . . " (Vehicle Code section 2800.2, subd. (a).)

Vehicle Code section 2800.2, subdivision (b), the statute in issue here, was added to section 2800.2 in 1996. It provides: "(b) For purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under [Vehicle Code] Section 12810 occur, or damage to property occurs."

Consistent with Vehicle Code section 2800.2, subdivision (b), the trial court instructed Pinkston's jury in the words of CALJIC No. 12.85 that: "A willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time the person driving commits three or more Vehicle Code violations, such as running a red light . . . , failing to stop at a posted stop sign . . . , passing a vehicle on the right by driving off the main traveled portion of the roadway . . . , driving with a suspended license . . . or damage to property. 'Willful or wanton' means an act or acts intentionally performed with a conscious disregard for the safety of

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sounding a siren as may be reasonably necessary. [¶] 3. The peace officer's motor vehicle is distinctively marked. [¶] 4. The peace officer's motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform."

persons or property. It does not necessarily include an intent to injure."

b. *Pinkston's contention.*

Pinkston contends Vehicle Code section 2800.2, subdivision (b) constitutes a constitutionally prohibited mandatory presumption which told the jury the element of willful or wanton disregard for the safety of persons or property existed if the basic fact of three Vehicle Code violations or property damage was present. Pinkston argues the instruction reduced the prosecution's burden of proof.

Pinkston claims the error requires reversal because the jury sent the trial court a note, shortly after deliberations commenced, which asked whether violation of three or more of the enumerated Vehicle Codes sections constitutes willful or wanton disregard for the safety of others "in and of itself?" The trial court responded affirmatively.

Pinkston further claims there was insufficient evidence of willful or wanton disregard absent the presumption. Pinkston argues the felony pursuit occurred on a Sunday in a residential area where traffic was light. Pinkston never came close to striking any other vehicle, he never caused any other vehicle to stop, brake hard or take evasive action to avoid a collision, the risk of danger was reduced by the lights and siren of the pursuing deputies which alerted others to the approach of Pinkston and the chase lasted only two minutes. Because Pinkston committed the required number of Vehicle Code violations in a relatively straightforward manner, the presumption found in subdivision (b) of Vehicle Code section 2800.2 allowed the jury to find the element of willful or wanton disregard without conducting an independent evaluation of the

evidence to determine the existence of that element. Pinkston concludes the felony evading conviction must be reversed.

c. *Resolution.*

An instruction which reduces the prosecution's burden of proving every element of an offense beyond a reasonable doubt violates a defendant's right to due process. (*Sandstrom v. Montana* (1979) 442 U.S. 510, 523-524 [61 L.Ed.2d 39]; *People v. Roder* (1983) 33 Cal.3d 491, 504.) "A mandatory presumption is one that tells the trier of fact that it *must* assume the existence of the elemental fact from proof of the basic fact. [Citations.] The prosecution may not rely on a mandatory presumption unless it is accurate. There must be a '"rational connection"' between the basic fact proved and the ultimate fact presumed [citation] and 'the fact proved [must be] sufficient to support the inference of guilt beyond a reasonable doubt.' [Citations.]" (*People v. McCall* (2002) 104 Cal.App.4th 1365, 1372, italics in original.)

Subdivision (b) of Vehicle Code section 2800.2 does not state a mandatory presumption. Rather, it sets out the Legislature's *definition* of what qualifies as willful and wanton conduct under subdivision (a). Although Vehicle Code section 2800.2 uses the phrase "willful or wanton disregard for the safety of persons or property" to describe an element of reckless evading, the statute defines this element so that it may be satisfied by proof of property damage or by proof of that the defendant committed three Vehicle Code violations. Thus, section 2800.2, subdivision (b) establishes a rule of substantive law rather than a presumption apportioning the burden of persuasion concerning certain propositions or varying the duty of

coming forward with evidence. (See *People v. Dillon* (1983) 34 Cal.3d 441, 474-475.) In other words, evasive driving during which the defendant commits three or more specified traffic violations *is* a violation of section 2800.2 *"because of the substantive statutory definition of the crime"* rather than because of any presumption. (*People v. Dillon, supra,* at p. 475.) Since there is no presumption, due process is not violated. (*Id.* at p. 476.)

This statutory scheme is similar to that found by our Supreme Court to be definitional, not an improper presumption, in connection with driving under the influence statutes. Prior to 1981, former section Vehicle Code 23126 established "a presumption that a person with a blood alcohol level of 0.10 or more was under the influence of alcohol." (*Burg v. Municipal Court* (1983) 35 Cal.3d 257, 264.) In 1981, the Legislature enacted a new driving under the influence statute, section 23152, subdivision (b), which provided: "'It is unlawful for any person who has 0.10 percent or more, by weight, of alcohol in his or her blood to drive a vehicle. [¶] For purposes of this subdivision, percent, by weight, of alcohol shall be based upon grams of alcohol per 100 milliliters of blood.'" (*Burg v. Municipal Court, supra,* at p. 264.) Addressing a challenge to the new statute, the Supreme Court concluded: "[S]ection 23152, subdivision (b), does not create a conclusive presumption of intoxication, nor does it 'eliminate[] the prosecutor's burden of proof when the accused is found to have [0.10] percent, by weight, of alcohol in [his] blood.' Instead, the statute defines, in precise terms, the conduct proscribed. . . . [¶] Although under section 23152, subdivision (b), it is no longer necessary to prove that the defendant was in fact under influence, the People still must prove beyond a reasonable doubt that at the time he was driving

his blood alcohol exceeded 0.10 percent." (*Id.* at p. 265, fns. omitted.)

More recently, the court in *People v. Bransford* (1994) 8 Cal.4th 885, addressed the current version of Vehicle Code section 23152, which prohibits driving with a blood-alcohol level of 0.08 percent, and rejected the same argument: "[W]e hold as we did in *Burg* . . . that section 23152(b) defined a particular type of prescribed conduct: it set forth an alternative definition of the offense of driving with a prohibited blood-alcohol concentration, i.e., driving with 0.08 percent or more of blood alcohol as defined by grams of alcohol in 210 liters of breath." (*People v. Bransford, supra,* 8 Cal.4th at p. 892, fn. omitted.) It further held the statute "did not presume that the driver was intoxicated or (under the influence); instead, it defined the substantive offense of driving with a specific concentration of alcohol in the body. Thus, it did not create an irrebuttable conclusive presumption." (*Id.* at pp. 892-893.)

Under Vehicle Code section 2800.1, the prosecutor must prove that the defendant was willfully fleeing from a peace officer under the circumstances described in that section. To support a conviction under section 2800.2, subdivision (b), the People need only additionally prove that the defendant committed at least three violations of the Vehicle Code or property damage during such flight that is sufficient to establish the offense defined by subdivision (b). There is no improper presumption involved.

The legislative history of the amendment that added subdivision (b) to Vehicle Code section 2800.2 confirms this conclusion. The Legislative Counsel's Digest states: "This bill would . . . *describe* acts that constitute driving in a

willful or wanton disregard for the safety of persons or property." (Stats. 1996, ch. 420, 1, p. 2176, italics added.)

Also instructive is the following analysis of the amendment: "This bill would define 'a willful or wanton disregard for the safety of persons or property' as behavior that includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count occur or damage to property occurs." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 1999 (1995-1996 Reg. Sess.) as amended July 7, 1996, p. 2.)

The conclusion that the amendment is definitional is also supported by the reasoning of *People v. Sewell* (2000) 80 Cal.App.4th 690. *Sewell* addressed whether Vehicle Code section 2800.2, as amended in 1996 to permit a finding of willful or wanton disregard based on three Vehicle Code violations, continued to constitute an inherently dangerous felony for purposes of second-degree murder. *Sewell* observed: "The 1996 amendment did not change the elements of the section 2800.2 offense, in the abstract, or its inherently dangerous nature. The amendment merely *described a couple of nonexclusive acts* that constitute driving with willful or wanton disregard for the safety of persons or property." (*People v. Sewell, supra,* at pp. 694-695, italics added.)

Based on the foregoing, we conclude Vehicle Code section 2800.2, subdivision (b), does not state a mandatory presumption. Rather, it merely defines, in precise terms, one way in which the People may prove the element of willful or wanton disregard for the safety of persons or

property. CALJIC No. 12.85 correctly repeated the statutory definition. Thus, neither the Vehicle Code section 2800.2 nor CALJIC No. 12.85 relieved the People of the burden of proving each element of the charged offense beyond a reasonable doubt and the trial court properly instructed the jury.

[[Begin nonpublished portion.]]

[[2. *There was no need for an instruction on unanimity in this case.*

Pinkston contends the evidence demonstrated numerous acts which could have established the three Vehicle Code violations and there was evidence Pinkston caused property damage when the Camaro crashed at the end of the pursuit. Pinkston argues some jurors could have convicted based on three or more Vehicle Code violations while others convicted based on property damage. Pinkston asserts he presented different defenses to the Vehicle Code violations and the property damage. Defense counsel argued the Vehicle Code violations did not occur as the deputies testified because the deputies did not broadcast the Vehicle Code violations.[2] Defense counsel also argued the evidence did not show damage to Pinkston's car or the structure it hit. Pinkston concludes that, in these circumstances, a unanimity instruction was required to ensure a unanimous verdict. (*People v. Diedrich* (1982) 31 Cal.3d 263.)

[2] An audiotape of the deputies' radio broadcasts during the pursuit was played for the jury.

This claim lacks merit. A criminal defendant has a fundamental right to a unanimous jury verdict. Thus, where the accusatory pleading charges a single offense and the evidence shows multiple acts which could constitute the crime charged, the jury must be instructed it must agree unanimously on the specific criminal act which constitutes the offense. (*People v. Diedrich, supra*, 31 Cal.3d at pp. 280-281.) The requirement that the jury unanimously agree on the same act typically applies to acts that could have been charged as separate offenses. (*Id.* at pp. 280-283; *People v. Beardslee* (1991) 53 Cal.3d 68, 92.)

However, the unanimity requirement does not apply where a single criminal offense is prosecuted under different theories of liability. "[W]here a statute prescribes disparate alternative means by which a single offense may be committed, no unanimity is required as to which of the means the defendant employed so long as all the members of the jury are agreed that the defendant has committed the offense as it is defined by the statute." (*People v. Sutherland* (1993) 17 Cal.App.4th 602, 613.)

"The key to deciding whether to give the unanimity instruction lies in considering its purpose. The jury must agree on a 'particular crime' [citation]. . . . But unanimity as to exactly how the crime was committed is not required. Thus, the unanimity instruction is appropriate 'when conviction on a single count could be based on two or more discrete criminal events,' but not 'where multiple theories or acts may form the basis of a guilty verdict on one discrete criminal event.' [Citation.] In deciding whether to give the instruction, the trial court must ask whether (1) there is a risk the jury may divide on two discrete crimes and not agree on any particular crime, or (2) the evidence

merely presents the possibility the jury may divide, or be uncertain, as to the exact way the defendant is guilty of a single discrete crime. In the first situation, but not the second, it should give the unanimity instruction." (*People v. Russo* (2001) 25 Cal.4th 1124, 1134-1135.)

Here, the jury could find willful or wanton disregard based on either three Vehicle Code violations or property damage. These were merely theories of guilt, i.e., alternate ways of proving the willful or wanton disregard element of the same Vehicle Code section 2800.2 charge. It follows that all 12 jurors were not required to agree on which Vehicle Code violations Pinkston committed or whether he caused property damage. It is sufficient that each juror was convinced beyond a reasonable doubt that Pinkston violated any three of the possible Vehicle Code violations or that damage to property occurred. Because the jury was not required to agree unanimously on the theory under which it found Pinkston guilty of evading a peace officer with willful or wanton disregard for the safety of persons or property, the trial court did not err by failing to instruct on unanimity. (*People v. Russo, supra*, 25 Cal.4th at pp. 1134-36; *People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1025; *People v. Santamaria* (1994) 8 Cal.4th 903, 918-919; *People v. Pride* (1992) 3 Cal.4th 195, 249-250.)

3. *Pinkston's prior conviction of making a criminal threat qualifies as a strike.*

In 1998, Pinkston pleaded guilty to making a criminal threat in violation of Penal Code section 422. At the time, making a criminal threat was not defined as a serious or violent felony. However, on March 8, 2000, Proposition 21 added the offense of making a criminal threat in violation of Penal Code section 422 to the list of serious felonies.

Pinkston contends his 1998 conviction of making a criminal threat cannot qualify as a strike without violating the prohibition against ex post facto laws.

Pinkston is mistaken. The determination whether a prior conviction qualifies as a strike is made based on the law as it existed at the time of the commission of the current offense. (*People v. James* (2001) 91 Cal.App.4th 1147, 1151; *People v. Green* (1995) 36 Cal.App.4th 280, 282-283; *People v. Sipe* (1995) 36 Cal.App.4th 468, 477-478.) The Three Strikes law and other enhancement provisions based on recidivism are triggered by current conduct and do not punish prior conduct. Thus, no ex post facto violation appears.

4. *No abuse of discretion appears in the trial court's ruling on the motion to strike the prior convictions.*

Pinkston filed a written motion asking the trial court to strike either the 1992 conviction of voluntary manslaughter or the 1998 conviction of making a criminal threat or both, in the interests of justice. At the hearing on the motion, defense counsel argued each prior conviction had been the result of a plea bargain after a jury could not reach a verdict. In the voluntary manslaughter case, the jury hung twice before Pinkston accepted a plea bargain. In that case, Pinkston was sentenced to six years in state prison but served only six additional months of custody. In the 1998 case, Pinkston pleaded guilty to making a terrorist threat, which was not a serious felony at the time, and received a time served sentence. Defense counsel noted Pinkston had served one prison term for fraud in the interim between the two serious felony convictions but that was the sum of Pinkston's prison time.

The People filed opposition to Pinkston's motion to strike. With respect to the voluntary manslaughter conviction, the People noted: "On July 30, 1990, three men committed a residential robbery at 2424 Gramercy Place. Fred Wilson was killed execution style, [with] (2 shots to the back of his head). . . . A pager was found at the scene which . . . was traced to [Pinkston]. When [Pinkston] was arrested the handguns used in the robbery-murder were discovered in his possession. Some of the stolen items were recovered from [Pinkston's] girlfriend. [¶] [Pinkston] claimed that some men broke into his car and stole his guns and pager prior to the robbery-murder and that [Pinkston] recovered these items later. [¶] Max Dizon admitted to breaking into [Pinkston's] vehicle but said that he only took some shotguns, not handguns or a pager." At the hearing on the motion, the prosecutor added that Pinkston served a year and a half in state prison following the guilty plea.

The People indicated the prior conviction of making a terrorist threat was based on the following facts: "[Pinkston] purchased a transmission from Greg Shepard for $500.00[.] [Pinkston] was not happy with the transmission and wanted his money back. Shepard refunded . . . $200.00 but [Pinkston] wanted a full refund. On September 6, 1997, [Pinkston] and another man went to Shepard's apartment with guns. [Pinkston] demanded his $300.00. . . . Shepard jumped out of the apartment window and broke bones in both feet. [¶] After a hung jury, [Pinkston] pleaded guilty to [a violation of] Penal Code [section] 422 on June 29, 1998 for 16 months in state prison."

At the hearing on the motion to strike, after hearing the argument of counsel, the trial court stated: "This is a

situation where Mr. Pinkston is 35 years old. This is his eighth felony conviction, three of which are for violence. . . . [¶] I read [Pinkston's] letter. I honestly don't know what to think of his letter. He still believes he did nothing more than violate a few traffic laws, and I guess that is the way he is always going to think. He was very lucky somebody wasn't hurt. He does it not once, but-twice. The only reason he gives is he thought he had a suspended license."

The trial court indicated it had read the case file in the prior conviction of making a terrorist threat and concluded the matter had been reduced because the People's witnesses failed to appear for trial. The People were able to use the transcript of the preliminary hearing to prove an assault with a deadly weapon charge but had to "reduce nine counts involving the second individual because they couldn't find him. . . . This is not the typical [violation of Penal Code section] 422."

The trial court reviewed Pinkston's criminal history and concluded Pinkston "deserves" a third strike term. "It isn't just his conduct here. It is his conduct throughout his entire adult life." The trial court noted Pinkston had been on parole at the time he was convicted of making a terrorist threat and at the time of the current offenses. The trial court concluded an order striking either prior conviction would not be appropriate.

On appeal, Pinkston reiterates the claims he made in the trial court. Namely, Pinkston argues the prior conviction of voluntary manslaughter was remote, having occurred 11 years ago, and Pinkston was not responsible for the death in that matter. Regarding the violation of Penal Code section 422, Pinkston asserts he pleaded guilty

to that offense after a jury could not reach a verdict on more serious charges and the violation Pinkston admitted was not a serious felony at the time. Pinkston argues his character, background and prospects indicate he is outside the spirit of the Three Strike law and notes the current offenses are not themselves serous or violent felonies and each of the evading incidents lasted only two minutes. The first offense occurred in the evening and the second pursuit was on a Sunday. Pinkston never came close to striking any other vehicle, he never caused any other vehicle to stop, brake hard or take evasive action. Pinkston concludes the denial of the motion to strike was an abuse of discretion.

We disagree. *People v. Williams* (1998) 17 Cal.4th 148, 161, explained that, in ruling on a motion to strike a prior conviction under the Three Strikes law, the trial court must consider whether, in light of the nature and circumstances of the present offense, the prior felony convictions, and the particulars of the defendant's background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he or she had not previously been convicted of one or more serous or violent felonies. (*People v. Garcia* (1999) 20 Cal.4th 490, 498-499.) The trial court's exercise of discretion is subject to review under the deferential, abuse-of-discretion standard. (*People v. Cole* (2001) 88 Cal.App.4th 850, 873, fn. 9; *People v. Myers* (1999) 69 Cal.App.4th 305, 309-310; but see *People v. Benevides* (1998) 64 Cal.App.4th 728, 734-735.)

Here, the trial court followed the procedure suggested by *Williams* and concluded an order striking Pinkston's prior convictions would be inappropriate. No abuse of discretion appears in the trial court's assessment.

Contrary to defense counsel's argument, both of Pinkston's prior convictions involved conduct that was much more violent than the prior conviction itself suggested. In each case, it appears Pinkston was fortunate not to have been convicted of far more serious offenses.

Regarding the current offenses, although neither was a serious or violent felony, the felony offense of evading a peace officer, even as amended in 1996 to permit a finding of willful or wanton disregard based on three Vehicle Code violations, constitutes an inherently dangerous felony for purposes of second degree murder. (*People v. Sewell, supra*, 80 Cal.App.4th at pp. 693-694.) Additionally, both of Pinkston's pursuits presented great danger to the pursuing officers, innocent motorists and pedestrians. Indeed, in the course of the first pursuit, a civilian motorist collided with one of the pursuing Culver City police officers and was taken from the scene in an ambulance. Thus, we are not persuaded by Pinkston's argument his conduct was not dangerous.

Rather, in light of the nature and circumstances of Pinkston's present felony conviction, his record of criminal behavior which repeatedly caused his incarceration, combined with his inability or unwillingness to rehabilitate, and also in light of the particulars of his background, character, and prospects, which were not positive, Pinkston cannot be deemed outside the spirit of the Three Strikes law. (*People v. Williams, supra*, 17 Cal.4th at p. 163; *People v. Stone* (1999) 75 Cal.App.4th 707, 717; *People v. Gaston* (1999) 74 Cal.App.4th 310, 321; *People v. Thornton* (1999) 73 Cal.App.4th 42, 48-49; *People v. Barrera* (1999) 70 Cal.App.4th 541, 554-555; *People v. McGlothin* (1998) 67 Cal.App.4th 468, 475-477.)

Thus, the trial court's refusal to strike Pinkston's prior serious felony convictions in the interests of justice was not an abuse of discretion.

5. *The term imposed does not constitute cruel and unusual punishment.*

Pinkston contends the 25 year to life term he received is disproportionate to his individual culpability, the crime for which it is imposed and it is excessive when compared to the punishment imposed for more serious offenses in this jurisdiction and when compared to the punishment imposed for the same offense in other jurisdictions. (*Solem v. Helm* (1983) 463 U.S. 277 [77 L.Ed. 2d 637]; *In re Lynch* (1972) 8 Cal.3d 410, 424; *People v. Dillon, supra*, 34 Cal.3d at pp. 476-489.) Pinkston claims his evading offenses were "mild" in that each lasted two minutes and Pinkston never came close to striking any other vehicle.

As suggested by the previous discussion section, we disagree with Pinkston's premise that his current offenses were "mild." Rather, both offenses demonstrated callous indifference to the safety of others. In any event, there is no requirement the current conviction be a serious or violent felony in order to avoid the claim a third strike term is cruel and unusual. (*People v. Strong* (2001) 87 Cal.App.4th 328, 344.)

Moreover, recent decisions of the United States Supreme Court reveal Pinkston's cruel and unusual punishment argument to be bereft of merit. On March 5, 2003, the United States Supreme Court decided *Lockyer v. Andrade* (Mar. 5, 2003, No. 01-6978) 538 U.S. ___ [123 S.Ct. 1166, 155 L.Ed.2d 144] and *Ewing v. California* (Mar. 5, 2003, No. 01-6978) 538 U.S. ___ [123 S.Ct. 1179, 155 L.Ed.2d 108].) In *Ewing*, the defendant was convicted

of felony grand theft for stealing three golf clubs and was sentenced to 25 years to life. (*Ewing v. California, supra*, 123 S.Ct. at p. 1184.) The defendant had four prior strike convictions for burglary and robbery as well as numerous others, and committed the current offense while on parole. Justice O'Connor, in her plurality opinion announcing the judgment of the Court, held the defendant's sentence "is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by [the defendant's] own long, serious criminal record." (*Id.* at p. 1190.)

In *Andrade*, the defendant was sentenced to 50 years to life based on two convictions for petty theft with a prior, which the prosecutor charged as a felony, for stealing videocassettes. (*Lockyer v. Andrade, supra*, 123 S.Ct. at p. 1170.) A five-Justice majority upheld the sentence, concluding that "[t]he gross disproportionality principle reserves a constitutional violation for only the extraordinary case" (*id.* 123 S.Ct. at p. 1175).

If the United States Supreme Court rejected the claim of cruel and unusual punishment in *Ewing* and *Andrade*, where the defendants' circumstances are far less aggravated than Pinkston's, we must conclude that Pinkston's term of 25 years to life does not amount to cruel and unusual punishment. Pinkston is being punished not only for the current offense but also for his recidivism. (*People v. Martinez* (1999) 71 Cal.App.4th 1502, 1512; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.) Pinkston's numerous prior convictions and prison terms reveal him to be "the kind of revolving-door career criminal for whom the Three Strikes law was devised." (*People v. Gaston, supra*, 74 Cal.App.4th at p. 320.)

Thus, the term imposed is not grossly disproportionate to the current offense and does not constitute cruel and unusual punishment in violation of the Eighth Amendment. Nor is the punishment "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch, supra*, 8 Cal.3d at p. 424; *People v. Dillon, supra*, 34 Cal.3d at pp. 477-478; see *People v. Murphy* (2001) 88 Cal.App.4th 392, 394 [upholding third strike term for petty theft where the accused had three prior convictions of burglary]; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1337-1338 [upholding third strike term for grand theft and commercial burglary]; *People v. Goodwin* (1997) 59 Cal.App.4th 1084, 1093-1094 [upholding third strike term for petty theft of a pair of pants].)]]

[[End nonpublished portion]]

DISPOSITION

The judgment is affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

CROSKEY, J.

I concur:

ALDRICH, J.

KLEIN, P.J., Dissenting.

I respectfully dissent from that portion of the majority's opinion that finds Vehicle Code section 2800.2 does not create an unconstitutional mandatory presumption.[1]

A violation of section 2800.2, subdivision (a), requires proof the defendant was fleeing or attempting to elude a pursuing peace officer in violation of section 2800.1 and that "the pursued vehicle [was] driven in a willful or wanton disregard for the safety of persons or property. . . ."[2]

Willful or wanton disregard for the safety of persons or property, a phrase that also appears in the definition of reckless driving in violation of section 23103, subdivision (a), requires more than negligence or even gross negligence. Willful or wanton disregard means "consciousness of the results with intent to omit or do an act, realizing the probable injury to another; or acting in reckless disregard of the consequences; or conduct exhibiting reckless indifference as to the probable consequences with knowledge of the likely resulting injury." (*People v. Allison* (1951) 101

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[1] Subsequent unspecified statutory references are to the Vehicle Code.

[2] Section 2800.1 provides: "Any person who, while operating a motor vehicle and with the intent to evade, willfully flees or otherwise attempts to elude a pursuing peace officer's motor vehicle, is guilty of a misdemeanor if all of the following conditions exist: 1. The peace officer's motor vehicle is exhibiting at least one lighted red lamp visible from the front and the person either sees or reasonably should have seen the lamp. [¶] 2. The peace officer's motor vehicle is sounding a siren as may be reasonably necessary. [¶] 3. The peace officer's motor vehicle is distinctively marked. [¶] 4. The peace officer's motor vehicle is operated by a peace officer . . . and that peace officer is wearing a distinctive uniform."

Cal.App.2d Supp. 932, 934; see also *People v. Dellinger* (1989) 49 Cal.3d 1212, 1220; *People v. Dewey* (1996) 42 Cal.App.4th 216, 221; *People v. Richie* (1994) 28 Cal.App.4th 1347; *People v. Schumacher* (1961) 194 Cal.App.2d 335, 340; *People v. McNutt* (1940) 40 Cal.App.2d Supp. 835, 837-838.)

However, section 2800.2, subdivision (b), added to section 2800.2 in 1996, permits the People to demonstrate willful or wanton disregard for the safety of persons or property based solely on the commission of three Vehicle Code violations or property damage during a pursuit.[3]

I agree with Pinkston's contention that subdivision (b) of section 2800.2 violates due process by reducing the People's burden of proof with respect to the element of willful or wanton disregard for the safety of persons or property.

People v. Roder (1983) 33 Cal.3d 491, 498, defined a mandatory presumption as one which "tells the trier of fact that it *must* assume the existence of the ultimate, elemental fact from proof of specific, designated basic facts. . . . " A conclusive mandatory presumption "removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption." (*Francis v. Franklin* (1985) 471 U.S. 307, 314 fn. 2 [85 L.Ed.2d 344].) *Roder* noted a mandatory presumption

[3] Section 2800.2, subdivision (b), provides: "(b) For the purposes of this section, a willful or wanton disregard for the safety of persons or property includes, but is not limited to, driving while fleeing or attempting to elude a pursuing peace officer during which time either three or more violations that are assigned a traffic violation point count under [Vehicle Code] Section 12810 occur, or damage to property occurs."

"limits the jury's freedom independently to assess all of the prosecution's evidence in order to determine whether the facts of the particular case establish guilt beyond a reasonable doubt." (*People v. Roder, supra,* at p. 498.) Therefore, the prosecution may not rest its case on a mandatory presumption unless "the basic fact proved *compels* the inference of guilt beyond a reasonable doubt." (*Ibid.,* fn. 7; *In re Ivey* (2000) 85 Cal.App.4th 793, 803-804; *People v. Van Winkle* (1999) 75 Cal.App.4th 133, 142-143; *People v. Reyes Martinez* (1993) 14 Cal.App.4th 1412, 1416.)

People v. Roder, supra, 33 Cal.3d at pages 500-501, struck down as unconstitutional a statutory presumption that a defendant knows property is stolen when he receives it without inquiry under circumstances which should cause a reasonable person to inquire to ascertain the right of the transferor to the property. *Carella v. California* (1989) 491 U.S. 263, 265 [105 L.Ed.2d 218] found unconstitutional a presumption that if a rental car was not returned within five days after expiration of the rental agreement, the defendant embezzled the vehicle.

The presumption in issue here is closely analogous to the presumptions addressed in *Roder* and *Carella.* The basic facts the prosecution must prove to bring the presumption into play – three Vehicle Code violations or damage to property – do not on their face establish beyond a reasonable doubt that the defendant acted with conscious disregard for the safety of persons or property during the pursuit. Obviously, a defendant may commit three Vehicle Code violations or cause property damage during a pursuit while exercising extreme vigilance for the safety of persons or property. Thus, the presumption allowed the People to establish the elemental fact of willful or wanton disregard, a relatively complex mental state,

based on three Vehicle Code violations or property damage even though the defendant's driving may, in fact, not have been reckless and the defendant's conduct, viewed in its entirety as it would have been absent the presumption, does not establish recklessness to the jury's satisfaction.

The majority insists section 2800.2, subdivision (b) merely defines with precision one type of conduct that qualifies as willful or wanton disregard for the safety of persons or property as that phrase is used in Vehicle Code section 2800.2. However, this assessment overlooks the fact that section 2800.2, subdivision (b), permits the People to prove conscious disregard for the safety of persons or property based on the commission of three or more Vehicle Code violations or the occurrence of property damage. This goes beyond mere definition and constitutes a classic example of a "mandatory presumption" because it "tells the trier [of fact] that [it] *must* find the elemental fact upon proof of the basic fact. . . . " (*Ulster County Court v. Allen* (1979) 442 U.S. 140, 157 [60 L.Ed.2d 777].)

The majority's analogy to section 23152, subdivision (b), which prohibits driving with a blood alcohol content of .08 or greater is not persuasive. *People v. Bransford* (1994) 8 Cal.4th 885, held section 23152, subdivision (b) does "not presume that the driver was intoxicated or 'under the influence'; instead, it defined the substantive offense of driving with a specified concentration of alcohol in the body. Thus, it did not create an irrebuttable conclusive presumption." (*People v. Bransford, supra,* at pp. 892-893.)

As *Bransford* found, section 23152, subdivision (b) does not direct the jury to presume intoxication upon a finding the defendant had a .08 blood alcohol level. Rather, section 23152, subdivision (b) defines an offense separate

from driving under the influence of alcohol or drugs, namely, driving with a blood alcohol content of 0.08 or greater. Driving under the influence of alcohol or drugs continues to be proscribed by section 23152, subdivision (a). Thus, the two statutes, although related, address different conduct.

Similarly, the Legislature could have defined an aggravated form of evading an officer which required proof the defendant committed three Vehicle Code violations or caused property damage during the pursuit. However, it did not. Instead, it enacted section 2800.2, subdivision (b) which requires the jury to presume the existence of willful or wanton disregard, an element of section 2800.2, subdivision (a), based on proof of the basic fact of three Vehicle Code violations or property damage. This amendment did not define a new crime. Rather, it reduced the quantum of evidence the People are required to produce in order to obtain a conviction of a violation of section 2800.2, subdivision (a). This, as previously noted, constitutes a classic example of a mandatory presumption.

The legislative history of subdivision (b) to section 2800.2 does not assist the majority's position. The Legislative Counsel's Digest refers to the amendment as merely describing "acts that constitute driving in a willful or wanton disregard for the safety of persons or property." (Stats. 1996, ch. 420, § 1, p. 2176, italics added.) This Legislative History was relied on by *People v. Sewell* (2000) 80 Cal.App.4th 690, which concluded 2800.2, as amended in 1996 to permit a finding of willful or wanton disregard based on three Vehicle Code violations or property damage,

continued to constitute an inherently dangerous felony for purposes of second-degree murder.[4] *Sewell* observed: "The [1996] amendment merely described a couple of nonexclusive acts that constitute driving with willful or wanton disregard for the safety of persons or property." (*People v. Sewell, supra,* at pp. 694-695.) Notwithstanding the description of the amendment in its legislative history, the actual effect of the amendment is an unconstitutional reduction in the People's burden of proving the willful or wanton disregard element of section 2800.2, subdivision (a). Thus, the amendment goes beyond mere definition and, on its face, constitutes an unconstitutional mandatory presumption that lightened the Peoples burden of proof.

The question remains whether the unconstitutional conclusive presumption was harmless in this case under the test defined in *Chapman v. California* (1967) 386 U.S. 18, 24. I cannot conclude it was.

Shortly after jury deliberations commenced, the jury asked the trial court if Pinkston's commission of three Vehicle Code violations satisfied the requirement the People prove willful or wanton disregard for the safety of persons or property "in and of itself?" Consistent with section 2800.2, subdivision (b), the trial court answered "yes." Also, as Pinkston repeatedly points out, neither officer testified Pinkston ever came close to striking any

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[4] Review has been granted in *People v. Howard* (S108353), September, 11, 2002, to address, inter alia, the same issue addressed in *Sewell*, whether a violation of section 2800.2 is a felony inherently dangerous to human life for purposes of the second degree felony-murder rule.

other vehicle, he never caused any other vehicle to stop, brake hard or take evasive action to avoid a collision and the chase lasted only two minutes. Finally, the jury convicted Pinkston only of misdemeanor evading with respect to the pursuit of September 14. Based on all of these factors, it follows that, absent the presumption, the jury might have convicted Pinkston only of a misdemeanor with respect to the pursuit of October 21. Accordingly, I cannot find beyond a reasonable doubt the mandatory presumption contained in section 2800.2, subdivision (b), did not contribute to the verdict of guilt.

I would reverse the felony conviction in count 2.

KLEIN, P.J.

Court of Appeal, Second Appellate District,
Division Three – No. B159294
S120323

IN THE SUPREME COURT OF CALIFORNIA

En Banc

(Filed Dec. 17, 2003)

THE PEOPLE, Plaintiff and Respondent,

v.

STEVEN TERROSE PINKSTON, Defendant and Appellant.

Petition for review DENIED.

GEORGE
Chief Justice